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NASHVILLE • MEMPHIS • MUSIC ROW

424 CHURCH STREET, SUITE 2800
NASHVILLE, TENNESSEE 37219-2386
(615) 259-1450 • FAX: (615) 259-1470
www.stokesbartholomew.com

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GUILFORD F. THORNTON, JR.
gthornton@stokesbartholomew.com

Direct Dial: 615/259-1492
Direct Fax: 615/687-1507

September 5, 2003

The Honorable Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: Complaint of Citizens Telecommunications Company of Tennessee, LLC against
Ben Lomand Communications, Inc.

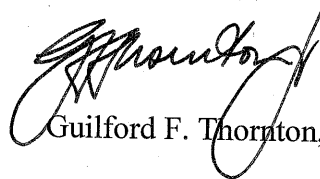
Docket No. 03-00331

Dear Chairman Tate:

I am enclosing with this letter an original and thirteen copies of Citizens
Telecommunications Company's response to Ben Lomand Communications, Inc.'s amended
motion to dismiss, which was filed yesterday. A copy has been served on counsel for Ben
Lomand Communications, Inc.

Should you have any questions or require anything further at this time, please do not
hesitate to contact me.

Sincerely,



Guilford F. Thornton, Jr.

cc: Mike Swatts
Gregg Sayre

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AUTHORITY

At the outset it is worth noting that in considering whether to dismiss a complaint at this stage in the proceeding, a court ordinarily construes the complaint liberally in favor of the plaintiff. *Cook Uitoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). A complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts in support of his claims that would support the relief requested. *Id.*

In this case, the facts alleged in the Complaint and the facts stated in Citizens' Response to the Authority's Data Request, filed on July 14, 2003 (the "Data Response") clearly establish that Citizens has stated a claim for the relief it has requested.

I. This Authority May Consider the Relief Requested by Citizens.

BLC asserts that Citizens lacks standing to bring this action because (a) Citizens has not shown any distinct palpable injury arising from BLC's failure to file specified tariffs, and (b) T.C.A. § 65-4-120 does not contemplate a private right of action. However, as cited on the first page of Citizens' Complaint, the Authority has the power to "investigate . . . upon complaints any matter concerning a public utility." T.C.A. § 65-4-117(1). Likewise, the Authority "shall, as appropriate . . . adopt other rules or issue orders to prohibit . . . anti competitive practices." T.C.A. § 65-5-208(c).

Ironically BLC itself has filed a complaint against Citizens in TRA Docket No. 02-01221 alleging that a Citizens' tariff violates T.C.A. § 65-5-208(c). BLC's complaint cites many of the same statutory provision as are cited by Citizens. Moreover, given the fact that Citizens and BLC are engaged in fierce competition, the relief requested by Citizens falls within the zone of interest to be protected by the statutes cited by Citizens. *See e.g.* T.C.A. § 65-4-123 (declaring a policy of this State to foster competition in this State) and T.C.A. § 65-5-208(c)(prohibiting anti-competitive practices).

With respect to Citizens' injury, Citizens specifically alleges that BLC has increased its business in Sparta and McMinnville by over 71%. Complaint, ¶ 3. Considering the fact that Citizens is the only competitor of BLC's for land lines in the Sparta and McMinnville markets, it follows that BLC's increase in business has been to the detriment of Citizens, and Citizens has

lost business as a result of BLC's anti-competitive practices.¹ Accordingly, Citizens has specifically alleged that the acts of BLC are anticompetitive for this reason. Complaint, ¶ 10. Likewise, in its Data Response Citizens stated, "BLC's failure to comply with TRA requirements has resulted in a distinct competitive disadvantage to Citizens." Data Response No. 1. Moreover, BLC's misappropriation of Citizens' drop wiring is a clear injury to Citizens. Based in the statutes cited by Citizens, the injuries to Citizens can be redressed by a remedy the Authority is authorized to provide.

Although T.C.A. § 65-4-120, by itself, may not support a private right of action, it does allow the Authority to fine the offending party. T.C.A. § 65-4-120. If BLC's argument were correct, then the only parties who could file a TRA complaint would be those parties who would not have to file a TRA complaint because they would already have a private right of action. Moreover, in its request for relief, Citizens has asked that the Authority exercise its enforcement rights against BLC. Clearly that is an appropriate request.

II. Citizens Has Demonstrated That BLC Has Offered Special Promotions Without Filing Tariffs.

BLC boldly states that it is "not the party referred to in Citizens's data responses." Amended Motion to Dismiss, p. 3. Nothing could be further from the truth.

There is no dispute that the TRA Regulations and the Tennessee Code require BLC to file tariffs. *See* TRA Rules 1220-4-1-.03 and .04, 1220-4-2.06, 1220-4-1.07 and 1220-4-8.07 cited at page 3 of the complaint. Citizens alleges that "[w]ithin the last year, BLC has been offering

¹ Citizens has stated in the case filed against it by BLC (TRA Docket No. 02-01221) that "[s]ince BLC has entered these markets, Citizens lost over 73% of residence lines and 65% of business lines in McMinnville since 1999 and 61% of residence and 44% of business lines in Sparta since 4th quarter 2000. (The loss is actually more because Citizens has not factored in the normal access line gain that it would normally have experienced absent competition.)" Response to Ben Lomand Communication, Inc.'s Motion to Compel Responses to its Discovery Requests, p. 4, fn. 1, filed April 7, 2003, TRA Docket No. 02-01221.

special promotions to customers and potential customers in Sparta and McMinnville Tennessee without complying with the above-referenced rules of the TRA.” Complaint, ¶ 10.

In Citizens’ Data Response, Citizens cited numerous examples of instances where BLC offered special promotions without filing Tariffs. In BLC’s initial mailings to Citizens’ McMinnville and Sparta customer base in early 2000, the postage reply card indicated, “There will be No Charge to change to us or to add a new line at this time.” Data Response No. 1. This mailing implies that all related installation charges were being waived. However, there does not appear to be any corresponding tariff on file with the TRA.

Although BLC correctly points out that many of the exhibits to the Data Response reference Ben Lomand’s parent company, Ben Lomand Telephone Cooperative, Inc., BLC fails to address the fact that the Data Response also states that Citizens’ employees also determined that “these promotions were, in fact, extended to BLC customers in McMinnville and Sparta.” Data Response No. 1. Affidavits of these Citizens employees are attached to the Data Response as Exhibit 3.

It is further noteworthy that after Citizens filed its Complaint on May 8, 2003, BLC filed a “Summer Waiver 2003 Program Promotion” request with the TRA to become effective July 1, 2003 under Tariff No. 2003696. Citizens has reason to believe that this is BLC’s first special promotion filing with the TRA since it entered the McMinnville and Sparta markets.

III. Citizens Has Shown That BLC Misappropriated Its Drop Wire And House Cabling.

According to Citizens’ Complaint, “BLC is without contractual, written or oral permission from Citizens, using the drop wire, house cabling on the network side of the customer interface point, and entrance cabling owned by Citizens to provide service to Citizens’ former

customers that BLC has taken from Citizens.” Complaint, ¶ 12. For the purpose of a motion to dismiss, this allegation must be taken as true. *See Cook*, 878 S.W.2d at 938.

Moreover, in its Data Response Citizens provided examples by way of photographs to show specific locations where BLC has engaged in this unlawful activity.

Ben Lomand’s “opinion that any concerns of Citizens with respect to this issue were settled” is not a basis to dismiss this part of Citizens’ Complaint.

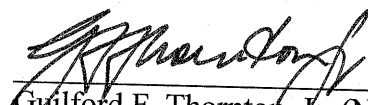
CONCLUSION

For the reasons stated herein, BLC’s motion to dismiss, as amended, should be denied.

WHEREFORE, Citizens requests that the Authority:

- A. Deny BLC’s motion to dismiss;
- B. If additional factual allegations are needed and can be alleged, allow Citizens to amend its complaint before dismissing this action;
- C. Convene a contested case and issue such other relief as is requested in Citizens’ Complaint; and
- D. Grant Citizens such additional relief as is appropriate.

Respectfully submitted,



Guilford F. Thornton, Jr. (No. 14508)

Charles W. Cook, III (No. 14274)

STOKES BARTHOLOMEW

EVANS & PETREE, P.A.

424 Church Street, Suite 2800

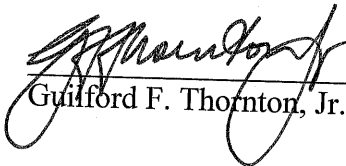
Nashville, Tennessee 37219

(615) 259-1450

*Attorneys for Citizens Communications
Company of Tennessee*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on H. LaDon Baltimore, Farrar & Bates, LLP, 211 Seventh Avenue, N., Suite 420, Nashville, Tennessee 37219 by facsimile transmission and by placing it in the U.S. Mail postage prepaid on this the 5th day of September, 2003.



Guilford F. Thornton, Jr.